Filed 1/26/09

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

JANE DOE, a Minor, etc., et al., Plaintiffs and Appellants, v. CALIFORNIA LUTHERAN HIGH SCHOOL ASSOCIATION et al., Defendants and Respondents; ASSOCIATION OF FAITH-BASED ORGANIZATIONS, Movant and Appellant.	E044811 (Super.Ct.No. RIC441819) **OPINION**

APPEAL from the Superior Court of Riverside County. Gloria Trask, Judge. Affirmed in part and dismissed in part.

Grace Hollis & Hanson, Kirk D. Hanson, Christopher J. Nelson, and Michael J. Grace for Plaintiffs and Appellants.

* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of parts III.C, III.D, III.E, IV and V.

Center for Law & Religious Freedom, Isaac Fong, Timothy J. Tracey; Alliance Defense Fund, Timothy D. Chandler; Law Offices of Stewart and Stewart and John Stewart for Movant and Appellant.

McKay, Graham & de Lorimier, John P. McKay and Michael P. Acain for Defendants and Respondents.

Defendant California Lutheran High School Association (the School) owns and operates a private religious high school. It expelled plaintiffs Jane Doe and Mary Roe on the ground that they had a homosexual relationship, in violation of the School's "Christian Conduct" rule. Plaintiffs then sued the School and its principal, the Reverend Gregory R. Bork, alleging, among other things, that the School had discriminated against them based on sexual orientation, in violation of the Unruh Civil Rights Act (Civ. Code, § 51 et seq.) (Unruh Act or section 51).

The trial court entered summary judgment in favor of defendants, ruling, in part, that the School was not a "business enterprise" and therefore not subject to the Unruh Act. Plaintiffs appeal. In the published portion of our decision, we will affirm this ruling. In the unpublished portion of our decision, we find no other error.[1] Hence, we will affirm the judgment.

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[1] Also in the unpublished portion of our decision, we will dismiss, as moot, the appeal by the Association of Faith-Based Organizations from an order denying it leave to intervene.

I

FACTUAL BACKGROUND

A. *Preliminary Statement.*

Because this is an appeal from a summary judgment, we draw the following facts from the moving and opposition papers in connection with defendants' motion for summary judgment. We accept all facts listed in defendants' separate statement that plaintiffs did not dispute. We also accept all facts listed in defendants' separate statement that plaintiffs *did* dispute, to the extent that (1) there is evidence to support them (Code Civ. Proc., § 437c, subd. (b)(1)), and (2) there is no evidence to support the dispute (Code Civ. Proc., § 437c, subd. (b)(3)). Finally, we accept all facts listed in plaintiffs' separate statement, to the extent that there is evidence to support them. (*Ibid*.) We disregard any evidence not called to the trial court's attention in the separate statement of one side or the other, except as necessary to provide nondispositive background, color, or continuity. (See *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 314-316.)

Each side filed objections to some of the other side's proffered evidence. The trial court overruled all such objections. In this appeal, none of the parties has argued that this was error. We therefore deem any such contention forfeited. Accordingly, we may take into account any and all of the proffered evidence. (Code Civ. Proc., § 437c, subd. (c); see *Lopez v. Bala* (2002) 98 Cal.App.4th 1008, 1014-1015.)

B. *Facts Shown by the Evidence*.

The School is a nonprofit corporation. It owns and operates the California Lutheran High School, a private religious school in Wildomar. The School is affiliated with the Evangelical Lutheran Synod (ELS) and the Wisconsin Evangelical Lutheran Synod (WELS).

The School is accredited by the Western Association of Schools and Colleges, a secular accreditation authority. It offers a college preparatory curriculum designed to meet University of California entrance requirements. It offers classes in English, Spanish, Latin, history, government, economics, science, mathematics, business and technology, music, and physical education, along with classes in religion. Some of these classes are mandated by the state Education Code. It boasts that its graduates work "in the fields of business, computers, construction, education, engineering, health and medicine, law, law enforcement, military, ministry, and music."

The School requires students to pay tuition fees; for the 2005-2006 school year, it charged WELS-affiliated students $4,590 and other students $6,500. Failure to pay tuition may result in suspension.

The School allows members of the public to buy tickets to its football games and other sporting events. At football games, it sells food, beverages, T-shirts, and "spirit items." It sells advertising space in its yearbook to Lutherans and non-Lutherans alike. It holds fund-raising auctions and golf tournaments that are open to the public. It has also

rented portions of its campus, such as the gymnasium or the football field, to outside organizations for their events.

Lutherans[2] believe that homosexuality is a sin. The School has a policy of refusing admission to homosexual students. Its "Christian Conduct" rule provided that a student could be expelled for engaging in immoral or scandalous conduct, whether on or off campus. This would include homosexual conduct.

The School's enrollment application, which was supposed to be signed by both the student and a parent, provided: "In attaching their signatures to this application, both student and parent . . . acknowledge their understanding that admission to California Lutheran High School places the student under the policies and regulations of the school . . . and obliges both student and parent . . . to accept and to cooperate with those policies and regulations."[3]

In early September 2005, a student at the School reported to a teacher that one unnamed female student had said that she loved another unnamed female student. The reporting student added that, if the teacher looked at these female students' MySpace pages, he would be able to find out who they were and how they felt about each other.

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[2] We use "Lutherans" as a shorthand way of referring to followers of either ELS or WELS, the only Lutheran synods whose beliefs are reflected in the record.

[3] Both Jane Doe and her mother signed her enrollment application. Mary Roe's father signed her enrollment application, but Mary Roe did not. Mary Roe's father denied ever reading the "Christian Conduct" rule. Mary Roe denied reading the rule but admitted knowing that it existed.

The teacher then reviewed the MySpace pages of all female students on the class roster, including plaintiffs' MySpace pages. Mary Roe went by the screen name, "Scandalous love!" Jane Doe went by the screen name, "Truely [*sic*] in ♥ with You." On their MySpace pages, plaintiffs referred to being in love with each other. In addition, Mary Roe's MySpace page listed her sexual orientation as "bi."[4] Jane Doe's listed hers as "not sure."

As a result, on September 7, 2005, Pastor Bork, the principal of the School, called a meeting of the School's Disciplinary Committee. The committee agreed that Pastor Bork should talk to plaintiffs immediately and ask them if the report was true; if it was, they should be suspended.

That same day, Pastor Bork had plaintiffs taken out of class and brought to separate rooms in the school office. He then questioned each of them, asking them whether they were bisexual, whether they had kissed each other, and whether they had done anything "inappropriate." At one point, according to Mary Roe, "he got very close and he said, 'Have you ever touched [Jane Doe] in . . . any inappropriate ways?' And he looked me up and down when he asked that."

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[4] Mary Roe admitted that the MySpace page was hers, but she claimed that a friend had created it for her and had falsely listed her as "bi" without her consent.

According to Pastor Bork, both girls admitted that they loved each other, that they had hugged and kissed each other, and that they had told other students that they were lesbians.[5] He therefore suspended them and had their parents come pick them up.

Throughout this time, plaintiffs were not free to leave. However, while they were waiting for their parents to pick them up, they were allowed to go to the restroom and to their lockers.

On September 12, 2005, Pastor Bork sent plaintiffs' parents letters stating that plaintiffs had been suspended because they had "a bond of intimacy . . . characteristic of a lesbian relationship," in violation of the "Christian Conduct" rule. On October 15, 2005, by a unanimous vote of the School's board of directors, the School expelled plaintiffs for engaging in a homosexual relationship.

Lutherans also believe that women should not be placed in a position of authority over men. Accordingly, only men serve on the School's board of directors, which is responsible for expulsions. Plaintiffs allege that, as a result, female students have been disciplined more harshly than male students. Their evidence showed that some male students had been involved in incidents of drug or alcohol possession or use that had resulted in, at most, temporary suspensions.

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[5] Plaintiffs deny admitting anything more than that they loved each other as friends. However, they do not claim that this factual dispute raised any triable issue of material fact. To the contrary, they claim that the School still discriminated against them based on their perceived sexual orientation.

II

PROCEDURAL BACKGROUND

Plaintiffs' operative complaint asserted three causes of action solely against the School: Sexual orientation discrimination in violation of the Unruh Act; gender discrimination in violation of the Unruh Act; and unfair business practices (Bus. & Prof. Code, § 17200). In addition, it asserted three causes of action against both the School and Pastor Bork: public disclosure of private facts; violation of the California constitutional right to privacy; and false imprisonment.

Both sides filed cross-motions for summary adjudication. Plaintiffs sought summary adjudication on their first cause of action, for sexual orientation discrimination. Defendants sought summary judgment on all causes of action. The trial court granted defendants' motion, while denying plaintiffs' motion as moot. It ruled, in part, that the School was not a business within the meaning of the Unruh Act. Accordingly, it entered judgment in favor of defendants.

III

THE SUMMARY JUDGMENT

Plaintiffs challenge the propriety of the summary judgment with respect to each of their causes of action. Accordingly, we begin by discussing the applicable standard of review, which we will then apply to plaintiffs' causes of action in succession.

A. *Standard of Review*.

"A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. [Citation.]" (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) "[I]n moving for summary judgment, a 'defendant . . . has met' his 'burden . . . if' he 'has shown that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. . . .' [Citation.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.) "We review the trial court's decision de novo . . . . [Citations.]" (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 65-66.)

B. *Causes of Action for Violation of the Unruh Act*.

First, plaintiffs challenge the summary judgment with respect to their causes of action under the Unruh Act. They contend that the trial court erred by ruling that the School was not a "business enterprise" subject to the act.

Preliminarily, plaintiffs argue that the trial court's ruling conflicts with previous rulings in the case. Early on, defendants demurred on multiple grounds, including that the School was not a business enterprise under the Unruh Act; the trial court overruled the demurrer on this ground. Moreover, when defendants sought writ review of that ruling, this court summarily denied their petition. However, because the demurrer concerned the pleadings, whereas the motion for summary judgment concerned the

evidence, the two rulings were not inconsistent. (*Leo F. Piazza Paving Co. v. Foundation Constructors, Inc.* (1981) 128 Cal.App.3d 583, 591, fn. 4.) Moreover, even assuming they were, the statutory limitations on reconsideration (Code Civ. Proc., § 1008) did not apply; hence, the trial court had plenary authority to change its mind. (*Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1096, 1100.) Finally, our order denying a writ did not establish the law of the case. (*Kowis v. Howard* (1992) 3 Cal.4th 888, 891.) Accordingly, we turn to the merits.

Following the lead of our Supreme Court in similar cases, "[w]e emphasize at the outset that our resolution of the legal issue before us does not turn upon our personal views as to the wisdom or morality of the exclusionary . . . policy challenged in this case. Instead, our task involves a question of statutory interpretation." (*Warfield v. Peninsula Golf & Country Club* (1995) 10 Cal.4th 594, 598.)

"The general policy embodied in [Civil Code] section 51 can be traced to the early common law doctrine that required a few, particularly vital, public enterprises — such as privately owned toll bridges, ferryboats, and inns — to serve all members of the public without arbitrary discrimination. [Citation.] After the United States Supreme Court, in the *Civil Rights Cases* (1883) 109 U.S. 3 [27 L.Ed. 835, 3 S.Ct. 18], invalidated the first federal public accommodation statute, California joined a number of other states in enacting its own initial public accommodation statute, the statutory predecessor of the current version of section 51. [Citation.] . . . [T]he 1897 statute, by its terms, specifically granted the right to 'full and equal accommodations, advantages, facilities

and privileges' in a number of specifically designated enterprises, as well as in 'all other places of public accommodation or amusement.'

"In 1959, in apparent response to a number of appellate court decisions that had concluded the then-existing public accommodation statute did not apply to the refusal of a private cemetery, a dentist's office, and a private school to make their facilities available to African-American patrons [citations], the Legislature undertook, through enactment of the Unruh Civil Rights Act, to revise and expand the scope of the then-existing version of section 51. . . . As ultimately enacted in 1959, the relevant paragraph of section 51 provided: 'All citizens within the jurisdiction of this State are free and equal, and no matter what their race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in *all business establishments of every kind whatsoever*.' [Citation.] In subsequent years, this paragraph of section 51 was amended to add 'sex' and 'disability' to the specified categories of prohibited discrimination [citations], but the paragraph otherwise has not been altered." (*Warfield v. Peninsula Golf & Country Club*, *supra*, 10 Cal.4th at pp. 607-609.)

"An organization is not excluded from the scope of Civil Code section 51 simply because it is nonprofit. [Citation.]" (*Hart v. Cult Awareness Network* (1993) 13 Cal.App.4th 777, 786.) Thus, cases have held that "business establishments" included (1) a nonprofit religious corporation that sold advertisements in a "Christian Yellow Pages" (*Pines v. Tomson* (1984) 160 Cal.App.3d 370, 383-386); (2) a homeowners'

association that "perform[ed] all the customary business functions" of a landlord (*O'Connor v. Village Green Owners Assn.* (1983) 33 Cal.3d 790, 795-796); (3) a club that offered its members substantial "commercial advantages and business benefits" (*Rotary Club of Duarte v. Board of Directors* (1986) 178 Cal.App.3d 1035, 1056; see *id*. at pp. 1055-1058); and (4) a club that operated a recreation center open to all local male children (*Isbister v. Boys' Club of Santa Cruz, Inc.* (1985) 40 Cal.3d 72, 78-84).

Two cases decided by the California Supreme Court afford particularly apt illustrations of what is — and what is not — a business establishment within the meaning of the Unruh Act. First, in *Warfield v. Peninsula Golf & Country Club*, *supra*, 10 Cal.4th 594, the court held that a member-owned nonprofit golf and country club was a business establishment. It conceded "that, at least as a general matter, the statute does not apply to truly private social clubs." (*Id*. at p. 617.) It concluded, however, that "*the business transactions that are conducted regularly on the club's premises with persons who are not members of the club* are sufficient in themselves to bring the club within the reach of [the Act]." (*Id*. at p. 621.)

The court explained: "[A]lthough the record indicates that defendant's financial support comes primarily from dues and fees paid by its members, the club derives a significant amount of revenue, as well as indirect financial benefit, from the use of its facilities, and the purchase of goods and services on its premises, by persons who are *not* members of the club. Because such 'business transactions' with nonmembers are conducted on a regular and repeated basis and constitute an integral part of the club's

operations — supplementing the members' own financial contributions and reducing the dues and fees that members otherwise would be required to pay in order to maintain the club's facilities and operations — we conclude that the club falls within the very broad category of 'business establishments' governed by the nondiscrimination mandate of section 51." (*Warfield v. Peninsula Golf & Country Club*, *supra*, 10 Cal.4th at p. 599.)

By contrast, in *Curran v. Mount Diablo Council of the Boy Scouts* (1998) 17 Cal.4th 670, the court held that, "with regard to its membership decisions, [the Boy Scouts of America] is not a business establishment within the meaning of the Unruh Civil Rights Act." (*Id*. at p. 696; see also *id.* at p. 696, fn. 15.) It acknowledged that "the term 'business establishments' must properly be interpreted 'in the broadest sense reasonably possible' [citation] . . . ." (*Id*. at p. 696.) "Nonetheless, . . . no prior decision has interpreted the 'business establishments' language of the Act so expansively as to include the membership decisions of a charitable, expressive, and social organization, like the Boy Scouts, whose formation and activities are unrelated to the promotion or advancement of the economic or business interests of its members. [Citation.]" (*Id*. at p. 697.)

The court went on to explain: "[I]n light of the legislative history demonstrating that the Unruh Civil Rights Act was intended *to extend* the reach of California's prior public accommodation statute, the very broad 'business establishments' language of the Act reasonably must be interpreted to apply to the membership policies of an entity — even a charitable organization that lacks a significant business-related purpose — if the

entity's attributes and activities demonstrate that it is the functional equivalent of a classic 'place of public accommodation or amusement.' [Citation.]

". . . [H]owever, we do not believe that the circumstance that the Boy Scouts is generally nonselective in its admission policies, and affords membership to a large segment of the public, is itself sufficient to demonstrate that the organization reasonably can be characterized as the functional equivalent of a traditional place of public accommodation or amusement. The record establishes that the Boy Scouts is an organization whose primary function is the inculcation of a specific set of values in its youth members, and whose recreational facilities and activities are complementary to the organization's primary purpose. . . . [M]embership in the Boy Scouts is not simply a ticket of admission to a recreational facility that is open to a large segment of the public and has all the attributes of a place of public amusement. Scouts meet regularly in small groups (often in private homes) that are intended to foster close friendship, trust and loyalty, and scouts are required to participate in a variety of activities, ceremonies, and rituals that are designed to teach the moral principles to which the organization subscribes." (*Curran v. Mount Diablo Council of the Boy Scouts*, *supra*, 17 Cal.4th at pp. 697-698.)

The plaintiff argued, by analogy to *Warfield*, that "the extensive business activities that the Boy Scouts regularly conducts with nonmembers — in its retail shops or stores, and through the licensing of the use of its insignia — properly should render the organization a business establishment . . . ." (*Curran v. Mount Diablo Council of the Boy*

Scouts, *supra*, 17 Cal.4th at p. 699.) The Supreme Court rejected this argument. It explained: "[T]he Boy Scouts is an expressive social organization whose primary function is the inculcation of values in its youth members, and whose small social group structure and activities are not comparable to those of a traditional place of public accommodation or amusement. . . . [T]he business transactions with nonmembers engaged in by the Boy Scouts do *not* involve the sale of access to the basic activities or services offered by the organization. Nonmembers cannot purchase entry to pack or troop meetings, overnight hikes, the national jamboree, or any portion of the Boy Scouts' extended training and educational process. Although we have no doubt that the Unruh Civil Rights Act would apply to, and would prohibit discrimination in, the actual business transactions with nonmembers engaged in by the Boy Scouts in its retail stores and elsewhere . . . [,] we conclude that such transactions do not render the Boy Scouts a business establishment so as to bring its membership policies or decisions within the reach of the Unruh Civil Rights Act. Those business transactions are distinct from the Scouts' core functions and do not demonstrate that the organization has become a commercial purveyor of the primary incidents and benefits of membership in the organization." (*Id*. at pp. 699-700.)

Curran is controlling here. Just like the Boy Scouts, the School "is an expressive social organization whose primary function is the inculcation of values in its youth members." (*Curran v. Mount Diablo Council of the Boy Scouts*, *supra*, 17 Cal.4th at p. 699.) According to its mission statement, as set forth in its student handbook, "CLHS

exists to glorify God by using his inerrant Word to nurture discipleship in Christ, serving primarily the youth of our WELS and ELS congregations, equipping them for a lifetime of service to their Savior, their homes, churches, vocations and communities."

Moreover, admission to the School, unlike membership in the Boy Scouts, is effectively selective and based on these values. As the Supreme Court noted, "the Boy Scouts is generally nonselective in its admission policies, and affords membership to a large segment of the public . . . ." (*Curran v. Mount Diablo Council of the Boy Scouts*, *supra*, 17 Cal.4th at p. 697.) It espouses values, such as being "'trustworthy, loyal, helpful, friendly, courteous, kind, obedient, cheerful, thrifty, brave, clean, and reverent'" (*id*. at p. 681, fn. 6), that appeal to a broad range of people. By contrast, the School espouses specifically Lutheran values; it offers admission to Lutheran families and to other "families . . . who are in harmony with the policies and principles of our school."

Although the fact that the School is nonprofit is not controlling, this does mean that it should not be deemed a business unless it has some significant resemblance to an ordinary for-profit business. In our society, however, private elementary and secondary schools are overwhelmingly not-for-profit enterprises. Even such prestigious and well-endowed private schools as Groton and Phillips Exeter Academy are charitable organizations. (<http://www.guidestar.org/pqShowGsReport.do?partner=seo&ein=04-2104265> and <http://www.guidestar.org/pqShowGsReport.do?partner=seo&ein=02-0222174>, as of January 8, 2009.) And public schools, of course, are run on a nonprofit basis by the government.

The California Attorney General has opined that, under *Curran*, the admission decisions of a private religious school are not subject to the Unruh Act. (81 Ops.Cal.Atty.Gen. 189 (1998).) His opinion states: "[A] private nonprofit religious school has as its 'overall purpose and function' the education of children in keeping with its religious beliefs. The 'inculcation of a specific set of values,' with programs 'designed to teach the moral principles to which the [school] subscribes,' prevents such a school from being considered a 'business establishment' whose student admission practices would be subject to the Act." (*Id*. at p. 195, fn. omitted.) We agree.

Plaintiffs argue that the School, like the country club in *Warfield*, engages in business transactions with the general public. They note that it sells tickets to football games and other sporting events; at these sporting events, it sells concessions, T-shirts, and "spirit items"; it holds fund-raising auctions and golf tournaments; and it sells advertising space in yearbooks. Nevertheless, unlike the nonmember transactions in *Warfield* — but like the nonmember transactions in *Curran* — these transactions "do not involve the sale of access to the basic activities or services offered by the organization." (*Curran v. Mount Diablo Council of the Boy Scouts*, *supra*, 17 Cal.4th at p. 700, italics omitted.)

Moreover, as the trial court aptly noted, "[T]he complaint of Mary Roe and Jane Doe isn't that they were excluded from purchasing a sweatshirt or going to a football game, but their dismissal from the school goes to the very heart of the reason for the[] existence of the school . . . ." In *Curran*, the court recognized that the Boy Scouts could

be a business, and be hence prohibited from discriminating, with respect to its nonmember transactions, yet *not* be a business, and hence *not* be prohibited from discriminating, with respect to its membership decisions. (*Curran v. Mount Diablo Council of the Boy Scouts*, *supra*, 17 Cal.4th at p. 700.) The same is true of the School.

Plaintiffs argue that the School is a business because it charges students for its educational services. However, both *Warfield* and *Curran* focused on business transactions with *nonmembers*. It seems implicit in both opinions that an otherwise private organization can engage in some business transactions with *members* without the risk of becoming a "business enterprise" for purposes of the Unruh Act. After all, even a private organization must have some source of funding for "the basic activities or services" that it offers. As long as this funding comes from members, it should not matter whether it is called a tithe, dues, fees, tuition, or something else.

In this connection, plaintiffs invoke *Pines v. Tomson*, *supra*, 160 Cal.App.3d 370, which held that a nonprofit religious corporation (CYP) that published a "Christian Yellow Pages" was a business subject to the Unruh Act. (*Pines*, at pp. 383-386.) There, however, the only counterargument CYP seems to have raised was that it was "nonprofit" and "noncommercial." (*Id*. at p. 386.) Thus, the court merely held that these attributes did not *preclude* CYP from being found to be a business for purposes of the Unruh Act. Moreover, the court relied on the opinion in *Curran v. Mount Diablo Council of the Boy Scouts* (1983) 147 Cal.App.3d 712 (*Pines*, at pp. 385-386), which had held (in the

context of a demurrer) that the Boy Scouts *was* a business. As we now know, this is not the law.

Plaintiffs claim that the business status of CYP in *Pines* was demonstrated by, "among other things," the fact that the CYP sold advertising in exchange for money. What the court in *Pines* actually said, however, was that "[w]hile the CYP certainly had 'businesslike attributes,' . . . the CYP 'fits both the commercial and noncommercial aspects of the meaning of "business establishment."' [Citation.]" (*Pines v. Tomsen*, *supra*, 160 Cal.App.3d at p. 386, quoting *Curran v. Mount Diablo Council of the Boy Scouts*, *supra*, 147 Cal.App.3d at p. 730.) From the court's use of the word "[w]hile," it appears to have meant it was not relying on these "business attributes" in holding that the CYP was a business establishment. Moreover, in a footnote, it listed the "business attributes" that the plaintiffs in *Pines* had cited, including not only that the CYP sold advertising space for money, but also that it was modeled on the telephone companies' Yellow Pages, it had originally been a "proprietary" operation of its founder, and its founder had "admi[tted]" that it had a "commercial and economic purpose." (*Pines*, at p. 386, fn. 10.) Thus, even under plaintiffs' reading of *Pines*, it does not appear that merely selling a service to like-minded persons for money is enough to make a nonprofit organization a "business establishment."

Plaintiffs argue that the School teaches not only religious subjects, but also such garden-variety secular subjects as English, history, mathematics, and physical education. Nevertheless, the School's religious message is inextricably intertwined with its secular

functions. The whole purpose of sending one's child to a religious school is to ensure that he or she learns even secular subjects within a religious framework; otherwise, merely supplementing the child's secular education with Sunday school or a religion class would suffice.[6]

Finally, plaintiffs cite the School's "complex structure," "large staff," "large income and budget," and "extensive physical facility . . . ." The Boy Scouts of America, however, has, if anything, a more complex structure, a larger staff, a bigger budget, and a more extensive physical facility, yet these factors evidently did not make it a business.

We emphasize the narrow scope of our holding. We hold only that the School established, beyond a triable issue of fact, that it is not a business establishment within the meaning of the Unruh Act. The School has also argued that the Unruh Act, if construed to prohibit it from discriminating based on sex or sexual orientation, would violate the right to freedom of expressive association, as well as the right to control the education of one's child.[7] We need not and we do not address these issues.

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[6] Plaintiffs assert that "[t]he Education Code *requires* that [the School]'s main purpose be education . . . ." (Bolding omitted.) However, the Education Code sections that they cite simply make elementary and secondary education compulsory (Ed. Code, §§ 37630, 48200, 48222) and require a private school to "offer instruction in the several branches of study required to be taught in the public schools of the state." (Ed. Code, § 48222; see also Ed. Code, § 51220.) Thus, while a private school must provide an education in secular subjects, plaintiffs have not shown that this must be its main purpose.

[7] The School does not invoke the right to freedom of religion, apparently recognizing that *North Coast Women's Care Medical Group, Inc. v. San Diego County Superior Court* (2008) 44 Cal.4th 1145 would be adverse authority on that point.

We therefore conclude that the trial court properly granted summary judgment on plaintiffs' Unruh Act causes of action.

C. *Causes of Action for Invasion of Privacy*.

Plaintiffs' second cause of action was for "violation of privacy (public disclosure of private facts)." (Capitalization omitted.) Their third cause of action was for violation of the state constitutional right to privacy. (Cal. Const., art. I, § 1.) In support of both causes of action, plaintiffs alleged that defendants violated their privacy by "interrogating" them about their sexual orientation and by then disclosing their suspected sexual orientation to their parents; to the School's board; and "to teachers, students[,] parents" and "members of the media . . . ."

The trial court granted summary judgment on these causes of action essentially because defendants established that Pastor Bork did not disclose plaintiffs' suspected sexual orientation to anyone other than the School's disciplinary committee and board of directors.

In this appeal, plaintiffs argue that this was error because the School violated the Unruh Act. As a result, they argue, "defendants were not privileged to inquire into nor to disseminate details of plaintiffs[']] sexual orientation." (Capitalization omitted.) In part III.B, *ante*, however, we held that defendants did *not* violate the Unruh Act.

Moreover, it is not at all clear that the trial court's ruling was in any way based on its ruling regarding the Unruh Act or on privilege. In moving for summary judgment on the second and third causes of action, defendants argued, among other things, that Pastor

Bork's disclosure to "a small number of individuals for a specific, non-malicious purpose" was not sufficiently "public" to be tortious. "The right of privacy is violated only by 'publicity' or 'public disclosure' — a communication to the public in general, or to a large number of persons, as distinguished from an individual or a few persons. [Citations.]" (5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 654, p. 960; see, e.g., *Warfield v. Peninsula Golf & Country Club* (1989) 214 Cal.App.3d 646, 660.) Defendants adequately established that that did not occur.

Plaintiffs do briefly contend that defendants also disclosed their suspected sexual orientation to their parents and to the administrators of their new schools. Plaintiffs forfeited any reliance on this supposed fact by failing to include it in their statement of undisputed material facts. (*San Diego Watercrafts, Inc. v. Wells Fargo Bank*, *supra*, 102 Cal.App.4th at pp. 314-316.) Moreover, the record merely shows that defendants sent plaintiffs' transcripts to their new schools. Plaintiffs even gave defendants permission to send those transcripts. The cited portions of the record fail to show that defendants disclosed plaintiffs' suspected sexual orientation, in the transcripts or otherwise.

Defendants did disclose plaintiffs' suspected sexual orientation to their parents. However, defendants could lawfully expel plaintiffs based on their suspected sexual orientation. Plaintiffs' parents, in light of their right to control their children's upbringing and education, had a right to know *why* plaintiffs were being expelled. Thus, defendants were entitled to tell them. (See Civ. Code, § 47, subd. (c) [common interest privilege].)

As plaintiffs also point out, unlike a violation of the common-law right to privacy, a violation of the state constitutional right to privacy does not require a disclosure to a large number of persons. (See *Porten v. University of San Francisco* (1976) 64 Cal.App.3d 825, 828-832; see also *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 27.) Their constitutional claim therefore requires additional analysis.

"[A] plaintiff alleging an invasion of privacy in violation of the state constitutional right to privacy must establish each of the following: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy." (*Hill v. National Collegiate Athletic Assn.*, *supra*, 7 Cal.4th at pp. 39-40.) "A defendant may prevail . . . by negating any of the[se] three elements . . . by pleading and proving, as an affirmative defense, that the invasion of privacy is justified because it substantively furthers one or more countervailing interests. The plaintiff, in turn, may rebut a defendant's assertion of countervailing interests by showing there are feasible and effective alternatives to defendant's conduct which have a lesser impact on privacy interests." (*Id*. at p. 40.)

"Although . . . minors[] enjoy[] a right of privacy protected by the California Constitution, the scope and application of that constitutional right differs significantly from the rights enjoyed by adults. [Citations.]" (*In re Carmen M*. (2006) 141 Cal.App.4th 478, 492-493.) Among other things, "a minor does not have a legitimate expectation of privacy to engage in consensual sexual activity with another minor." (*In re T.A.J.* (1998) 62 Cal.App.4th 1350, 1362, fn. omitted.) Even assuming plaintiffs had

some legitimate expectation of privacy regarding their sexual orientation, that expectation was diminished once they enrolled in a private school that deemed homosexual conduct to be a violation of school rules. This is true even if they never read the "Christian Conduct" rule; obviously, the School had rules, and they could be subject to them even if they never read them.

Meanwhile, even a "student's legitimate expectation of privacy must be balanced against the school's obligation to maintain discipline . . . ." (*In re Cody S*. (2004) 121 Cal.App.4th 86, 91 [Fourth Dist., Div. Two].) "When parents place minor children in private schools for their education, the teachers and administrators of those schools stand *in loco parentis* over the children entrusted to them." (*Vernonia School Dist. 47J v. Acton* (1995) 515 U.S. 646, 654 [115 S.Ct. 2386, 132 L.Ed.2d 564].) "As a general matter, parents during a child's minority have the legal right (and obligation) to act on behalf of their child to protect their child's rights and interests, and in most instances this general rule would apply to interests of the minor that are protected by the state constitutional right of privacy . . . . Thus, for example, although past cases have established that the state constitutional right of privacy generally guarantees an individual's right to consent to, or to refuse to consent to, medical treatment or medication [citations], . . . [n]o one reasonably could suggest that a serious state constitutional privacy question would be presented, for example, whenever a parent, over a child's objection, requires the child to go to the dentist or to take his or her medicine." (*American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 335-336, fn.

omitted.) Similarly, a parent would be entitled to question a child about his or her sexual orientation and to disclose the resulting information to any appropriate pastoral authorities. The School, in loco parentis, was equally entitled to do so.

Plaintiffs have not suggested any feasible or effective alternatives that would have had a lesser impact on their privacy interests. Pastor Bork questioned each of them separately and privately. It is hard to imagine how he could have determined whether they had a homosexual relationship without asking the questions that he in fact asked. Plaintiffs note that he sat "very close" to them and that, at one point, he "look[ed] Mary Roe up and down." However, this innuendo falls short of evidence that he displayed some kind of prurient interest in them. To the contrary, as Mary Roe also testified, "He just looked at me like I was a disease and I was so wrong." Finally, as the trial court found, he disclosed the information that he had only to those who had a need to know as part of the disciplinary process.[8]

Accordingly, either because plaintiffs' reasonable expectation of privacy was negligible or because it was outweighed by defendants' countervailing interests, defendants did not violate plaintiffs' constitutional right to privacy.

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[8] It would also appear that these disclosures were also protected by the common interest privilege. (Civ. Code, § 47, subd. (c).) The privileges in Civil Code section 47 "extend to causes of action based on the constitutional right to privacy." (See *Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 952 [dealing with the litigation privilege, Civ. Code, § 47, subd. (b)].)

We therefore conclude that the trial court properly granted summary judgment on plaintiffs' causes of action for invasion of privacy.

D. *Cause of Action for False Imprisonment*.

Plaintiffs' fourth cause of action alleged that defendants falsely imprisoned plaintiffs by "detain[ing them] against their will for over two hours . . . [¶] . . . [¶] . . . for the sole purpose of interrogating [them] about their sexual orientation."

"[F]alse imprisonment . . . is . . . 'the unlawful violation of the personal liberty of another.' [Citation.] . . . 'The elements of a tortious claim of false imprisonment are: (1) the nonconsensual, intentional confinement of a person, (2) without lawful privilege, and (3) for an appreciable period of time, however brief.' [Citation.]" (*Lyons v. Fire Ins. Exchange* (2008) 161 Cal.App.4th 880, 888.)

"' . . . [U]nemancipated minors lack some of the most fundamental rights of self-determination — including even the right of liberty in its narrow sense, i.e., the right to come and go at will. They are subject, even as to their physical freedom, to the control of their parents or guardians.' [Citation.]" (*In re Randy G*. (2001) 26 Cal.4th 556, 562.) "While at school, a student may be stopped, told to remain in or leave a classroom, directed to go to a particular classroom, given an errand, sent to study hall, called to the office, or held after school. Unlike a citizen on the street, a minor student is 'subject to the ordering and direction of teachers and administrators . . . . [¶] [A student is] not free to roam the halls or to remain in [the] classroom as long as she please[s], even if she

behave[s] herself. She [is] deprived of liberty to some degree from the moment she enter[s] school . . . .' [Citations.]" (*Id*. at p. 563.)

Plaintiffs point out that a school's control over a child's liberty is not unlimited. For example, a school cannot detain a minor student if the detention is "arbitrary, capricious, or for the purposes of harassment. [Citations.]" (*In re Randy G*., *supra*, 26 Cal.4th at p. 567.) Moreover, even a parent can be liable for false imprisonment of his or her own child if the "acts of restraint or confinement . . . are committed with the intent to harm the child or with the intent to achieve an unlawful purpose . . . ." (*People v. Checketts* (1999) 71 Cal.App.4th 1190, 1196.) They therefore argue that the School detained them for the "unlawful purpose" of discriminating against them based on their perceived sexual orientation.

Thus, plaintiffs essentially concede that their false imprisonment claim stands or falls with their Unruh Act claim. For example, they do not argue that, even if the School was allowed to discriminate against them based on their perceived sexual orientation, the confinement was excessive in duration or scope. In part III.B, *ante*, we held that the School is not a business establishment within the meaning of the Unruh Act; hence, it could lawfully discriminate based on perceived sexual orientation. It necessarily follows that the School's confinement of plaintiffs, which plaintiffs themselves allege was "for the sole purpose of interrogating [them] about their sexual orientation," did not constitute tortious false imprisonment.

E. *Cause of Action for Unfair Business Practices*.

Plaintiffs' fifth cause of action alleged that, by violating the Unruh Act, the School was also violating the Unfair Competition Law (Bus. & Prof. Code, § 17200). Once again, in part III.B, *ante*, we concluded that the School demonstrated that it did not violate the Unruh Act. It necessarily follows that the trial court also properly granted summary judgment on plaintiffs' unfair business practices claim.

IV

DISCOVERY SANCTIONS

Plaintiffs also contend that the trial court erred by issuing sanctions against them based on their refusal to respond to discovery concerning their actual sexual orientation.

A. *Additional Factual and Procedural Background*.

1. *Motion to Compel Interrogatory Responses*.

Defendants filed motions to compel further responses to form interrogatory 17.1, which asked plaintiffs to specify the basis for any of their denials of any requests for admission. Defendants also requested an award of sanctions against plaintiffs and their attorneys.

Plaintiffs opposed the motions, arguing with respect to particular interrogatory responses that their actual sexual orientation was irrelevant and that their "sexual thoughts, feelings and communications" were protected by the state constitutional right to privacy.

On December 1, 2006, the trial court granted the motions to compel. However, it did not grant the request for sanctions.

2. *Motion to Compel Answers to Deposition Questions*.

Meanwhile, on November 22, 2006, defendants filed motions to compel plaintiffs (as well as Mary Roe's father) to answer certain deposition questions. Plaintiffs had objected to each of these questions based on their right to privacy. Defendants requested two awards of $1,790 in sanctions — one against Jane Doe and her attorneys and the other against Mary Roe's father and his attorneys.[9]

The questions at issue included the following questions posed to Mary Roe:[10]

"Q: *Did you ever print on your Web site that you were bisexual?*"

"Q: *Did you ever tell anyone that you could not change your love for Jane Doe?*"

"Q: *Who made you*[*r*] . . . *MySpace* [*page*]*?*"

"Q: *What . . . was it that you wrote on the* [*MySpace*] *blog?*"

"Q: *On any of those blogs, did you ever say that you loved Jane Doe?*"

"Q: *What does B-I mean to you*?"

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[9] Defendants did not give notice that they were seeking sanctions against Mary Roe. It is unclear whether the trial court did ultimately award sanctions against Mary Roe (see fn. 11, post); if it did, however, she has not challenged the sanctions awarded against her based on lack of notice. We deem any such challenge forfeited.

[10] We have added italics to differentiate the questions objected to from questions to which objections were not made but which are including to provide context. Original italics and bolding have been omitted.

"Q: *Did you tell the person who created your Web site that your orientation was bi?*"

"Q: Your father had the Web site taken down?

"A: Yes.

"Q: *Why?*"

The questions at issue also included the following questions posed to Jane Doe:

"Q: *Where do you go to school?*"

"Q: How did you happen to find Dr. Levornia?

"A: I have gone to him for different reasons previous years before then.

"Q: *What were the different reasons you've seen Dr. Levornia before?*"

"Q: "*Do you actively practice any religion at the present time?*"

"Q: *Are you aware of the religion's position on homosexuality that you do practice?*"

"Q: . . . [W]ho did you go to the prom with?

"A: Kyle. [¶] . . . [¶]

"Q: And had you dated Kyle before that time?

"A: Um, I've hung, yes, at the mall a couple of times and —

"Q: *How many times have you been out on dates with him?*"

"Q: *What was your relationship with Mary Roe in the summer of 2005?*"

"Q: *Did you ever discuss with Mary Roe the fact that she described her orientation* [*on her MySpace page*] *as* '*BI*'*?*"

"Q: . . . [E]very time you used the word love in this — on this Web — on these Web pages was relating to a band?

"A: No. The — the name, title, 'Truely in [Love]' — it's the name of a song.

"Q: *But you meant to convey that to Mary Roe as you were truly in love with her, didn't you*?" (Last brackets in original.)

"Q: *Did . . . a relative of Mary Roe's ever catch you and Mary Roe kissing?*"

On January 3, 2007, plaintiffs' counsel notified defendants' counsel that, in light of the trial court's order of December 1, 2006, granting the motions to compel further interrogatory responses — and thus overruling plaintiffs' privacy objections — plaintiffs were willing to provide answers to the challenged deposition questions. They added, however, "As the [p]laintiffs . . . have already sat for deposition, and as the questions sought to be compelled are few and straightforward, [p]laintiffs request that [d]efendants submit each of the subject questions by way of special interrogatory."

On January 4, 2007, defendants' counsel declined to proceed by way of special interrogatory, noting that "the benefit of an oral deposition is that the deposing party may ask and obtain immediate information on any follow-up questions that reasonably relate to the original question posed."

On January 11, 2007, plaintiffs filed their opposition to the motions. They argued again that their actual sexual orientation was irrelevant and that the challenged questions violated their state constitutional right to privacy. However, they also argued that the motion was "moot" because they were now willing to answer the challenged questions.

Moreover, for the first time, they offered to provide answers at a deposition, not just in response to special interrogatories.

On January 26, 2007, the trial court granted the motions to compel. It also awarded $500 in sanctions against Jane Doe and Mary Roe (and Mary Roe's father).[11]

3. *Motion to Compel Production of Documents*.

Meanwhile, defendants also filed a motion to compel production of documents in response to subpoenas to several third parties, including Dr. Sai Chundu, a psychologist who had treated Mary Roe.

Mary Roe opposed the motion, arguing yet again that the discovery sought violated her state constitutional right to privacy.

On April 6, 2007, the trial court granted the motion to compel, but only as to Dr. Chundu.

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[11] According to the trial court's minute orders, *$500 each* in sanctions were awarded against Jane Doe, Mary Roe's mother (presumably as her guardian ad litem), and Mary Roe's father. According to the notice of ruling served by defendants' counsel, however, *$1,500* in sanctions were awarded *jointly and severally* against Jane Doe, Mary Roe's father *and their attorneys* (but not against either Mary Roe or her mother). Plaintiffs have not provided us with a reporter's transcript of the hearing, which might have cleared up these discrepancies.

Plaintiffs' attorneys did not file a notice of appeal. Assuming, without deciding, that they would nevertheless be entitled to participate as parties to this appeal (compare *Eichenbaum v. Alon* (2003) 106 Cal.App.4th 967, 974 and *Kane v. Hurley* (1994) 30 Cal.App.4th 859, 861, fn. 4 with *Laborde v. Aronson* (2001) 92 Cal.App.4th 459, 465 and *Taylor v. Varga* (1995) 37 Cal.App.4th 750, 761, fn. 12), they have not filed a brief arguing that the sanctions were erroneous with respect to them. Accordingly, we also deem any challenge to the award against plaintiffs' attorneys to have been forfeited.

B. *Analysis*.

Preliminarily, it is not at all clear which discovery orders plaintiffs are challenging. They refer to a "discovery dispute [that] was broad in scope and included, inter alia, [p]laintiffs' objections to subpoenas to mental health providers, objections to requests for admissions, and objections to deposition testimony." From their citations to the record, however, it appears that they are challenging only the December 1, 2006, order compelling further interrogatory responses and the January 26, 2007, order compelling further answers to deposition questions, and *not* the April 6, 2007, order compelling production of documents by Dr. Chundu. In addition, they state: "Plaintiffs have already suffered through responding to [d]efendants' discovery requests concerning their sexual orientation and other private matters. Nothing can be done to reverse that indignity. But this [c]ourt can and should reverse the sanctions orders . . . ." Only the January 26, 2007, however, order awarded any sanctions.

"A case is moot when the decision of the reviewing court 'can have no practical impact or provide the parties effectual relief. [Citation.]' [Citation.]" (*MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, 214.) As plaintiffs concede, even assuming the December 1, 2006, and April 6, 2007, orders were erroneous, there is no longer any effective appellate remedy for the error. This is particularly true because we are affirming the judgment on the merits. Accordingly, any challenge to these orders is moot.

By contrast, if the January 26, 2007, order was erroneous, we could still reverse the portion of the order awarding sanctions. Even assuming that the sanctions have already been paid, plaintiffs would be entitled to restitution. (See generally 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, §§ 900-901, pp. 964-965.) Thus, we can review only the January 26, 2007, order, and even then only as to the sanctions award.

It could be argued that plaintiffs forfeited their challenge to the January 26, 2007, order by conceding that they were willing to answer the challenged deposition questions. It is clear, however, that they agreed to do so because — and *only* because — the trial court had already overruled their similar objections to interrogatories. "'. . . "'An attorney who submits to the authority of an erroneous, adverse ruling after making appropriate objections or motions, does not waive the error in the ruling by proceeding in accordance therewith and endeavoring to make the best of a bad situation for which he was not responsible.'" [Citation.]' [Citation.]" (*Park City Services, Inc. v. Ford Motor Co., Inc.* (2006) 144 Cal.App.4th 295, 311 [Fourth Dist., Div. Two].)

In any event, even assuming plaintiffs forfeited any error in granting the motions to compel, they did not forfeit any error in awarding sanctions. In order to award sanctions, the trial court had to find not only that the motions were meritorious, but also that plaintiffs had not "acted with substantial justification . . . ." (Code Civ. Proc., § 2025.480, subd. (f).) Plaintiffs are therefore still entitled to argue in this appeal that their objections were substantially justified.

"We review the trial court's ruling on a discovery sanction under the deferential abuse of discretion standard. [Citation.] We will affirm the sanction order unless it is arbitrary, capricious, whimsical, or demonstrates a '"manifest abuse exceeding the bounds of reason. . . ."' [Citations.]" (*In re Marriage of Chakko* (2004) 115 Cal.App.4th 104, 108.)

Plaintiffs' only argument is that the challenged questions invaded their right to sexual privacy.[12] Many of the challenged questions, however, did not relate to plaintiffs' sexuality. These included such questions as, "Who made you[r] . . . MySpace?," "What does B-I mean to you?," "Why [did your father have your Web page taken down]?," "Where do you go to school?," and "Do you actively practice any religion at the present time?"

Other questions, even though arguably related to plaintiffs' sexuality, asked about matters that had already been disclosed to third parties. These included, "Did you ever print on your Web site that you were bisexual?," "Did you ever tell anyone that you could not change your love for Jane Doe?," "On any of those blogs, did you ever say that

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[12] They also assert, in a single sentence, that "[m]edical, psychological, financial and employment records are likewise subject to a right to privacy." Such a contention, however, is not fairly embraced in the caption of their argument, which states, "The court abused its discretion when it ordered plaintiffs to respond to discovery concerning *intimate details of their sexuality* and sanctioned plaintiffs for exercising their constitutional privacy rights." (Capitalization, bolding, and underlining omitted; italics added.) (See Cal. Rules of Court, rule 8.204(a)(1)(B).) Moreover, this bare assertion is not supported by any argument — e.g., that such other matters were not directly relevant to the litigation.

you loved Jane Doe?," and "Did . . . a relative of Mary Roe's ever catch you and Mary Roe kissing?"

Accordingly, even assuming some of the challenged questions did, in fact, invade a protected zone of sexual privacy, the trial court could properly find that plaintiffs' objections were overbroad and lacked substantial justification. We also note that the trial court awarded substantially less than the full $1,709 against each plaintiff that defendants were seeking. Plaintiffs have not shown that this was error.

V

THE ASSOCIATION'S MOTION TO INTERVENE

As we mentioned earlier (see fn. 1, *ante*), the Association of Faith-Based Organizations (the Association) filed a motion for leave to intervene as a defendant. The trial court denied the motion. It explained: "[T]he proposed intervenor's interest must be direct rather than consequential. [¶] And I cannot find that you have a direct interest in this case."

The Association has appealed from the order denying it leave to intervene. However, because we are affirming the summary judgment, there is no longer any action for the Association to intervene in. "It is well settled that . . . intervention is not permitted after trial has been concluded and judgment rendered [citations]." (*Drinnon v. Oliver* (1972) 24 Cal.App.3d 571, 585-586, overruled on other grounds in *Johnson & Johnson v. Superior Court* (1985) 38 Cal.3d 243, 255, fn. 7.) The situation would be different if the Association were challenging the propriety of the summary judgment

(*Drinnon*, at p. 586; see, e.g., *Johnson v. Hayes Cal Builders, Inc.* (1963) 60 Cal.2d 572, 575-576; *Linder v. Vogue Investments, Inc.* (1966) 239 Cal.App.2d 338, 342-343), but it is not. At oral argument, the Association suggested that we should review the denial of its motion to intervene because the Supreme Court might yet grant review. Even if it does, however, — and even if it reverses the summary judgment — it could still remand to us with directions to review the denial of the motion to intervene in that light. (Cf. *In re Marriage of Assemi* (1994) 7 Cal.4th 896, 912 [reversing Court of Appeal's judgment that the parties' settlement agreement was not enforceable; "the matter is remanded to the Court of Appeal with directions . . . to reconsider the issue of the ancillary award of sanctions"].) We will therefore dismiss the Association's appeal as moot.

VI

DISPOSITION

In plaintiffs' appeal, the judgment is affirmed. Defendants are awarded costs of that appeal against plaintiffs.

The Association's appeal is dismissed as moot. In the interests of justice, all parties shall bear their own costs of that appeal.

CERTIFIED FOR PARTIAL PUBLICATION

RICHLI
J.

We concur:

RAMIREZ
P.J.

MILLER
J.